

1 IN THE UNITED STATES DISTRICT COURT  
2

3 FOR THE DISTRICT OF ALASKA  
4

5 RONALD E. ZUBER, )  
6 Plaintiff, )  
7 vs. )  
8 APC NATCHIQ, INC., )  
9 Defendant. )  
10 \_\_\_\_\_

11 Case No. A03-0052 CV (RRB)

12 DEPOSITION OF JAMES RAND CARR

13 APPEARANCES:

14 For the Plaintiff: Kenneth L. Covell, Esq.  
15 712 Eighth Avenue  
16 Fairbanks, Alaska 99701  
17  
18 For the Defendant: Gregory L. Youngmun, Esq.  
19 DeLisio, Moran, Geraghty & Zobel  
20 943 West Sixth Avenue, Suite 110  
21 Anchorage, Alaska 99501  
22  
23 Also Present: Mark Nelson

24 \* \* \* \* \*

25 Pursuant to Notice, the Deposition of JAMES RAND CARR was  
taken on behalf of the Plaintiff before Teresa E. Mielke, Notary  
Public in and for the State of Alaska and Reporter for Gemini  
Reporting Services, at the Offices of Gemini Reporting Services,  
943 West Sixth Avenue, Suite 110, Anchorage, Alaska, on the 8th  
day of September, 2003, commencing at the hour of 11:00 a.m.

26 \* \* \* \* \*



27 Reporting Services  
28 943 West 6th, Suite 110  
29 Anchorage, Alaska 99501  
30 277-8591

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6	<u>EXHIBITS</u>	
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8	6: Mr. Carr's file on WHOL 122	10
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1	<u>P R O C E E D I N G S</u>	
2	(Oath administered)	I know, what else....
3	MR. CARR: I do.	2 A Electrical, plumbing, elevators, boilers, amusement rides.
4	JAMES RAND CARR,	3 Q All right. And you're here in response to a subpoena
5	having first been duly sworn under Oath, testified as follows:	4 today?
6	REPORTER: And for the record would you please state your	5 A Yes, I am.
7	full name?	6 Q If you don't understand my question, say so. If you need
8	A James Rand Carr.	7 to take a break, say so. We're hoping to be brief today,
9	REPORTER: And spell your last name for me?	8 I think. In response to the subpoena did you bring some
10	A C-A-R-R.	9 documentation today?
11	REPORTER: And what is your mailing address?	10 A Yes, I did.
12	A P. O. Box 107021, Anchorage, 99510.	11 Q All right, and could you briefly describe what you have
13	REPORTER: And your occupation?	12 there?
14	A I'm the chief of labor standards with the Alaska	13 A Essentially it's three separate documents. There's a June
15	Department of Labor.	14 19th letter from Mark Nelson of Alaska Petroleum
16	REPORTER: Thank you.	15 Contractors with attachments, a job description for
17	BY MR. COVELL:	16 materials supervisor and a sample notice of wage
18	Q Mr. Carr, good morning, how are you today?	17 payments, and some other attendant documents relative to
19	A Fine, thanks.	18 the materials supervisor position. There is another
20	Q Good. Have you ever been deposed before?	19 letter dated June 25th from Mr. Nelson to me. And my
21	A Yes.	20 response to him dated June 26th, which is also fashioned
22	Q Lots of times?	21 as wage and hour opinion letter Number 122.
23	A More than a few, less than a dozen.	22 Q Okay, and just for some housekeeping here trying to keep
24	Q Okay, all right, and were those generally in conjunction	23 straight what we have to what you have, I'm going to hand
25	with your employment?	24 you a letter dated June 19 entitled determination letter
		25 to you from Mr. Nelson. Our copy says APC 201 and I'd
	Page 4	Page 6
1	A Yes.	1 represent that this is an exact copy of Exhibit 4, Page
2	Q In regard to your employment, you said you're chief of the	2 201 of our Exhibit 4. And could you compare that to your
3	labor standards division. What does that mean?	3 June 19th letter?
4	A I manage the two sections of the labor standards and	4 A Yes, that's the same letter.
5	safety division, which is comprised of three sections, but	5 Q And does that appear -- other than I note on your copy
6	I am in charge of the wage and hour and the mechanical	6 there's a received stamp, June 19, '97, labor standards,
7	inspection sections.	7 is on your copy, and the APC number isn't on your copy.
8	Q Okay, and could you just brief tell me what the mechanical	8 Other than that, they -- and there's a fax information on
9	inspection portion of your job is?	9 the top of yours?
10	A The mechanical inspection section is comprised of	10 A Correct.
11	professional-level inspectors, electrical, plumbing,	11 Q Other than that they appear identical?
12	elevator, boiler inspectors, and these folks have	12 A That's correct.
13	responsibilities for providing the inspection services	13 Q Okay. And then I'll hand you what I represent is APC Page
14	across the state, and I manage and supervise the group of	14 202 of Exhibit -- our previous Exhibit 4, which is a June
15	people in that area.	15 25 letter to you, Mr. Carr, from Mr. Nelson. Could you
16	Q Okay, so for instance a boiler inspector comes to my	16 make the same comparison as previous -- on the previous
17	office in Fairbanks and checks my boiler, he's one of your	17 letter?
18	subordinates?	18 A Same document. My copy has the fax charter on top, your
19	A Most often, yes.	19 copy has the APC number on the bottom. Otherwise
20	Q Okay, assuming he's a State boiler inspector?	20 they're -- they're identical.
21	A Correct.	21 Q And when does it indicate the fax was sent from who to
22	Q Okay, and then are there intermediary supervisory levels	22 who?
23	between you and those....	23 A June 25th, '97, from APC to our number in our office.
24	A I have an assistant chief over mechanical inspection.	24 Q Okay, and then, let's see, why don't we -- well, as long
25	Q And that would include electrical, plumbing and, I don't	25 as we're on that June 25 letter, that had attachments.

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1	right?	
2 A	No, I believe the June 19th letter had attachments. I 3 don't think there's anything on the June 25 letter.	1 employees of APC as exempt or nonexempt from that -- from 2 that time period, for starters?
4 Q	Okay, let's go to the June 19 letter attachments, so the 5 second page. And it appears the next two pages there are 6 a job description for materials supervisor?	3 A Unless it was issued as a formal opinion letter and 4 assigned an opinion letter number, it would've gone into 5 general correspondence, which would've been destroyed 6 after a year.
7 A	Yes, it's captioned two -- Job Number 626, APC job 8 description, warehouse, division, construction/ 9 maintenance, job title, materials supervisor.	7 Q Okay, as far as the June 19th letter -- I'm sorry, the 8 June 19th letter, why is that with your papers instead of 9 in general correspondence, if you can answer?
10 Q	Okay, and I'll show you what I represent is Exhibit 4, 143 11 and 144 of our prior Exhibit 4, and could you make the 12 comparison of those documents, those two pages as well?	10 A Because it's part and parcel of the back-up for wage and 11 hour opinion letter 122.
13 A	With the exception of the aforementioned additions of the 14 APC numbers on yours and the fax chatter on mine, there's 15 also what either may be a scribble or an initial on the 16 second page of yours, they're the same document.	12 Q Okay, if in general you had an employer -- well, let's 13 back up. And employer can call you or contact your office 14 and request an opinion as to whether a job is exempt or 15 nonexempt from overtime, is that correct?
17 Q	Okay, very good, thank you. And then subsequent to that 18 you have -- why don't you count off how many pages you 19 have there for us?	16 A Yes.
20 A	Excluding the two we just looked at?	17 Q And that's part of the service you provide to the public?
21 Q	Right.	18 A Yes.
22 A	Five pages.	19 Q Okay, if an employer was to make that nature of inquiry to 20 you -- well, if they were to make that nature of inquiry 21 to you in writing would that then result in it being 22 stored in this binder as a WHOL?
23 Q	Okay, and why don't you just read the titles of each those 24 pages, it'd be the first page subsequent to the job 25 description?	23 A WHOL. If it was captioned as a WHOL. Not every document 24 that goes out from our department is given the status of a 25 wage and hour opinion letter. What these documents are
	Page 8	Page .
1 A	The first page, with the heading of Alaska Petroleum 2 Contractors, Inc., notice of wage payments. The next page 3 is "Roles and Responsibilities Form" for the position 4 title materials supervisor, APC. And that would appear to 5 continue for the next three pages as there's lists of 6 duties and responsibilities for the materials supervisor.	1 used for within the Department is sort of a historical 2 record of the Department's opinion on -- on circumstances 3 as they evolve over time. It is for the particular case 4 an opinion for that snapshot in time. The opinion itself 5 may change over time because the laws may change or the 6 court interpretations of the laws may change. So when we 7 issue a formalized opinion, when someone asks us for a 8 formal Department opinion we issue it as an opinion 9 letter. Then we'll keep all the back-up with it.
7 Q	Okay, and that's a total of four pages.....	10 Q Okay, let me just back up and do something for the record 11 here. Those papers we just discussed about your 12 correspondence with Mr. Nelson that we detailed here, are 13 those kept in the regular course of business of the 14 Department of Labor?
8 A	Yes.	15 A Yes, they are.
9 Q	....that last document? Okay, and did you make a search 10 of your files concerning correspondence between you and 11 Mark Nelson and/or APC concerning classification of jobs 12 as exempt or nonexempt prior to coming to the deposition?	16 Q All right, and to your knowledge are they true and 17 accurate copies of what you have in your files?
13 A	There's no file per se as you have described it. What I 14 looked at was the State's record copy of the opinion 15 letter, wage and hour opinion letter 122, and the back-up 16 documentation for that opinion letter, which are the 17 documents we've so far identified. They would be attached 18 together as a historical record for the opinion letter.	18 A Yes.
19 Q	Okay, and are those kept in a binder somewhere?	19 MR. COVELL: All right, I'd like to get those marked now 20 for the record.
20 A	Yes, they are.	21 (DEPOSITION EXHIBIT NUMBER 6 MARKED)
21 Q	And are those available to the public?	22 REPORTER: Do you want to put a paper clip on it?
22 A	Yes, they are.	23 MR. COVELL: All right.
23 Q	And the pages you've brought with you, then, were attached 24 to that. Does the Department, to your knowledge, have any 25 other papers that might pertain to classification of	24 Q Okay, and for the record, then, those papers you brought with you are now marked as Carr Exhibit 6, right?

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1 A	Right.	
2 Q	Going back to the WHOL -- and what does that stand for again?	
3 A	Wage and hour opinion letter. It might be useful to	
4	describe how that -- what this means in the context of the	
5	agency.	
6		
7 Q	Sure, if you'd do that, please?	
8 A	We have three forms of historical documents that we	
9	maintain. Two of them are opinion letters, one is wage	
10	and hour opinion letter, such as this, another is an	
11	opinion letter given in the area of public contracts and	
12	that is fashioned as P-C-O-L, or public contracts opinion	
13	letters. And those two types of letters are, as I said	
14	earlier, a specific opinion to a specific employer on a	
15	specific set of facts, and they represent what the	
16	Department's opinion is that point in time given our	
17	understanding and interpretation of the law at that point	
18	in time. The third type of record that we would maintain	
19	is called a wage and hour policy letter, or W-H-P-L, which	
20	is, as opposed to the opinion letters which are generally	
21	directed externally, are internal documents used to	
22	provide policy to staff on the Department's position on	
23	certain issues, practices and procedures and	
24	administrative functions and things of that sort.	
25 Q	Okay. Would the WHPLs -- sometimes a little slow in	
	Page 12	Page 14
1	listening -- pertain to classification of employees as	
2	exempt or nonexempt for overtime?	
3 A	Not a specific employee, but they might address a generic	
4	issue dealing with classifications.	
5 Q	Are those maintained in -- well, did you say those are	
6	only available to -- internally in the Department?	
7 A	No, they are -- they are public documents, but their	
8	primary purpose is to convey policy to staff.	
9 Q	So they provide guidance to staff essentially?	
10 A	Correct.	
11 Q	Okay. All right, and so you said that the three kinds we	
12	have now are the WHPL, which is wage and hour policy	
13	letter, WHOL, which is wage and hour opinion letter, of	
14	which we have an example here, and the PCOL, which is	
15	something that probably doesn't concern wage and hour	
16	classification, right?	
17 A	Correct.	
18 Q	Okay. And those are the only types of opinions your	
19	Department issues, is that right or wrong?	
20 A	Those are the only types of formal opinions that we issue.	
21	We modeled this somewhat after the U. S. Department of	
22	Labor's administrative practice. And they have private	
23	letter rulings in some instances, like the IRS uses, and I	
24	imagine a lot of federal government agencies use those,	
25	that address specific situations as posed by someone,	

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1	sufficiently complex that we could simply answer the question that was posed but in doing so with a yes or a no it would leave so many other questions that you just have to have a discussion to be able to ask further questions of them and answer and provide the information as necessary in order to flesh it all out and not given misleading information. So we usually are contacted in one of two ways, telephonically or via the mail. If someone calls up and says, well, here's what I've got and I'd like to have an opinion, what's your opinion? I'd say, well, I need you to put it all in writing. I may discuss it with them on the phone to try and find out exactly what it is they're talking about and what the facts are that they're -- that they're putting forward. But bottom line our experience, unfortunately, in the 20 years I've been doing this is that sometimes the facts are not represented accurately for a variety of reasons. Not necessarily through maliciousness or deceit, it's just that there's a different perception of things and many times the managers or the human resource people that are making the request haven't been given all the information from the field folks. So we kind of try and hold their feet to the fire and say, this is what we need. You can give us your job description and that's fine, it's a good place to start, but it's generally not enough. Because	1 they're representing to us are on paper so that we can -- we can point to the document six years later and say, these are the facts upon which we based that opinion. And most of our opinions contain a caveat -- I see this one doesn't, but most of our opinions contain a caveat that this is in fact limited to this facts and this fact pattern and this position and shouldn't be applied to any other.

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1	most exemptions that we deal with have a -- one or sometimes a couple of percentage of duties tests. So we ask them to go back and break down the job description into finite duties that are performed within these various broad categories that are described in the job description, and assigning to those duties percentages of time spent performing them in an average work week, so that we can make the analysis as to whether there's a 20% test that's passed, or a 40% test that's passed, or failed. Because those are usually key to establishing whether an exemption applies. So there's very often some feedback back and forth before we get everything in on our desk that we can then examine and reach some sort of conclusion and issue an opinion.	1 A No.
15	Q Okay. Now, the WHOL is wage and hour opinion letter. Does the Department give oral opinions as to whether or not an employee or a position would be exempt or nonexempt?	2 Q And as far as the handwriting on this paper, that's not your handwriting, is it?
19	A It is not our practice. That is not to say that someone in my office or even myself in discussing something with somebody might say, "well, you know, that doesn't sound like it's exempt", or "that sounds like might nonexempt -- might be exempt." but the practice is if somebody wants to pursue that then they need to give us the facts in writing because we want to make sure that the facts	4 A No, I've not seen these documents before, to my knowledge.
25		5 Q Okay, have you ever seen this form in blank before?
		6 A I don't believe I've seen this form in this format. I've seen things similar to this that some employers use for kind of a quick analysis by people who aren't that familiar with the exemptions to go through as a checklist.
		10 A Not this document, however.
		11 Q And just to be clear, this is something that we got from APC and in trying to figure out where it came from we speculated it might've been from the Department of Labor, but it's your testimony that this isn't a form that you're familiar....
		16 A This would not have come from the State Department of Labor because this is applying the federal standards because they're -- in the reference to the executive, administrative and professional tests they're applying short tests, which are federal standards nonexistent in State law.
		22 Q If you had done a WHOL for APC about this time frame in regard to a warehouseman or a warehouseman supervisor, would you have come across that in coming here today and responding to this subpoena?

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1 A	Probably not, 'cause I didn't look through all of the --	1 when you -- let me be more clear. When you call up the
2	through the index to check every single one. 'Cause I was	2 WHOIS on the web in the index, are the job descriptions
3	referenced to just 122 and that was all I focused on when	3 mentioned somehow or listed in the index?
4	I was looking through the records.	4 A They generally are because that's the only thing that
5 Q	That's says Number 122 on it. Did you start at some	5 makes sense in terms of a reference. If someone wanted to
6	particular time, 1980 or.....	6 -- was asking about a materials supervisor then it would
7 A	Started at one back in -- We put these into effect roughly	7 generally be something like APC materials supervisor. But
8	'83, '84 when I first came on board as supervisor.	8 unfortunately, since I've had six secretaries in that 20
9 Q	Okay, and then you maintain a binder here in Anchorage of	9 years, and they've been primarily responsible for doing
10	these. Are they available in other offices of the	10 the index, I can't swear that it's always going to be a
11	Department?	11 sensible relationship to the document.
12 A	Yes, each of our office has copies of the opinion letter	12 Q Do you ever suggest to -- well, okay. When you do a
13	themselves. The backup documentation is not always	13 formal opinion letter do you think it's reasonable for an
14	attached to the copies that are sent to the field offices.	14 employer to rely upon that determination in paying an
15	If it's a very unique question or the facts are rather	15 employee as exempt or nonexempt?
16	unique and it's -- we think it's instructive to staff, we	16 A A formal opinion letter such as WHOI 122?
17	may attach the back-up. But in most cases we don't,	17 Q Sure.
18 Q	Okay, would the WHOIS as you describe them be available in	18 A Yes. I fact, I think that's the type of document that the
19	Fairbanks?	19 legislature was -- had in mind when they wrote the
20 A	Yes.	20 expanded language dealing with liquidated damages here
21 Q	And who would the contact be there?	21 about four years ago. And they -- they specifically
22 A	Ms. Monte Jordan.	22 indicated that there would be a good faith consideration
23 Q	Okay, I take it -- well, I	23 in liquidated damages, and if an employer could make a
24 A	I believe -- oh, by the way, I believe the index for all	24 good faith showing that they acted upon some advice from
25	of these is available on line on our web page.	25 the Department of Labor, this being an excellent way of

	Page 20	Page 22
1 Q	Okay, and why don't you.....	1 showing that, that they could be held not liable for
2 A	But not the documents themselves but the index.	2 liquidated damages if they were in fact found guilty of an
3 Q	Why don't you recite that for us slowly, if you would? If	3 overtime violation. As opposed to certainly the opposite
4	you can.	4 end of the continuum, which is not bothering to ask, just
5 A	All right, I'm not sure I can give you the syntax, but I	5 thinking, well, that was our understanding of the law.
6	can tell you how to get there. <a href="http://www.labor.state.ak.us">www.labor.state.ak.us</a> .	6 And I remember the context of some of the testimony in the
7	That should bring up the Department of Labor home page.	7 legislature when they were considering that legislation.
8	From there there is a pick for divisions, and you would	8 and those were the two ends of the continuum they were
9	select the labor standards and safety division. Within	9 looking at, and certainly an opinion, formal opinion from
10	the division home page there is a pick for sections --	10 the Department of Labor was something they thought would
11	actually there are paragraphs and each paragraph has a	11 be satisfactory in terms of mounting an adequate defense.
12	hypertext tiling for the sections, and wage and hour	12 Q What involvement did you have in that good faith defense
13	administration is the section you would pick. Within that	13 being adopted, as you said, approximately.....
14	page then when that comes up there should be a pick list	14 A Not a great deal at that point, that was handled almost
15	on the left-hand side that has a variety of things dealing	15 primarily by the commissioner at that time.
16	with programs, and I believe on the left-hand side of that	16 Q Okay, based on your testimony, obviously you had an
17	page, although I'm not positive, but I think it's on the	17 opportunity to listen in to some testimony?
18	left-hand side of that page there's an index selection for	18 A Oh, yes, I listened in to be able to answer questions from
19	WHOIS, W-H-O-Ls, PCOOLs, P-C-O-Ls, and WHPLs, W-H-P-Ls.	19 the legislators if they had them during the various
20 Q	All right, and then how many from number one to number	20 hearings.
21	what do we go, roughly speaking, with WHOIS these days?	21 Q So were you available as a resource for the legislatures
22 A	I think we're probably up in the 130, 140 range on WHOIS,	22 during the course of the hearings? Or were you expecting
23	probably 180 to 190 in WHPLs, and something less than that	23 phone calls or something?
24	in public contract opinion letters.	24 A It happened both ways -- or, it happens both ways, and I
25 Q	And when you call these up on the web, then, is the job --	25 can't recall now whether in that particular case --